RE APPLICATION OF TAN BOON LIAT @ ALLEN; TAN BOON LIAT v. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

[O.Cr.J. (Abdoolcader J.) May 6, 1976]
[Ipoh — Criminal Application No. 22 of 1976]

Administrative Law — Habeas Corpus — Detention under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Trafficking in drugs as a member of an international drug distribution syndicate — Whether within purview of Ordinance — Meaning of "public order" — Whether preamble can be used in interpreting section — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, ss. 4(1) and 5(2).

Interpretation of Statutes — Whether preamble can be used to restrict meaning of section.

Dangerous Drugs — Trafficking in drug as a member of an international drug distribution syndicate.

The applicant had been served with a detention order by the Minister of Home Affairs, the grounds being in effect that he was trafficking in drugs as a member of an international drug distribution syndicate. The applicant applied for a writ of habeas corpus and challenged the validity of the order of detention on the contention that the grounds on which the order was made was dehors the purview and ambit of the Ordinance. It was argued that the scope of the Ordinance was limited and that it applied and was intended to apply only for the purposes of suppressing activities involving violence and preventing crimes of violence. Reliance was placed on the preamble to the Ordinance. Section 4(1) of the Ordinance empowers the Minister to make a detention order if he is satisfied that it is necessary to do so with a view to preventing any person from acting in any manner prejudicial to public order or where it is necessary for the suppression of violence or the prevention of crimes involving violence.

Held, dismissing the application: (1) where the enacting words of the section are clear, the preamble cannot operate to restrict that meaning. The preamble cannot be invoked for the purpose of creating ambiguity in a statute;

(2) it is abundantly clear that trafficking in drugs as a member of international drug distribution syndicate which was the ground on which the order of detention against the applicant was made strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order.

Cases referred to:-

(1) *Liversidge* v. *Anderson* [1942] A.C. 206, 219, 251, 280.
(2) *Eliezer Zabrovsky* v. *General Officer Commanding Palestine* [1947] A.C. 246, 255.
(3) *Shreekant Pandurang Ketkar* v. *Emperor* A.I.R. 1943 Bom. 169, 173, 174.
(4) *Yeap Hock Seng* v. *The Minister for Home Affairs, Malaysia* [1975] 2 M.L.J. 279, 282, 285.
(5) *Rameshwar Shaw* v. *District Magistrate, Burdwan & Anor.* A.I.R. 1964 S.C. 334.
(6) *Ward* v. *Holman* [1964] 2 Q.B. 580.
(7) *Secretary of State for India* v. *Maharajah of Bobbili* [1919] 46 I.A. 302.
(8) *Powell* v. *The Kempton Park Racecourse Company,* Ltd. [1889] A.C. 143, 185.
(9) *Badri Prasad* v. *Ram Narain Singh* A.I.R. 1939 All 157.
(10) *Board of Commissioners of Peace Officers Annuity and Benefit Fund* v. *Clay* 102 S.E. 2d. 575, 577.
(11) *Cartewall* v. *Connecticut* (1940) 310 U.S. 296, 308.
(12) *Romesh Thappar* v. *State of Madras* A.I.R. 1950 S.C. 124, 127.
(13) *State of Rajasthan* v. *G. Chawla* A.I.R. 1959 S.C. 544.
(14) *Pushkar Mukherjee* v. *State of West Bengal* A.I.R. 1970 S.C. 852.
(15) *Sushanta Goswami* v. *State of West Bengal* A.I.R. 1969 S.C. 1005, 1006, 1010.
(16) *Shyamlal Chakravarty* v. *Commissioner of Police, Calcutta* A.I.R. 1970 S.C. 269, 272.
(17) *Sudhir Kumar Saha* v. *Commissioner of Police, Calcutta* A.I.R. 1970 S.C. 814.
(18) *Kanu Biswas* v. *State of West Bengal* A.I.R. 1972 S.C. 1656, 1658, 1659.
(19) *Kishori Mohan Bera* v. *State of West Bengal* A.I.R. 1972 S.C. 1749, 1752.
(20) *Sk. Kedar* v. *State of West Bengal* A.I.R. 1972 S.C. 1647.
(21) *Milan Banik* v. *State of West Bengal* A.I.R. 1974 S.C. 1214.
(22) *Golam Hussain* v. *Commissioner of Police, Calcutta* A.I.R. 1974 S.C. 1336, 1343.
(23) *Rex* v. *Basudeva* A.I.R. 1950 F.C. 67, 68, 69.
(24) *Rameshwarlal Patwari* v. *State of Bihar* A.I.R. 1968 S.C. 1303.
(25) *Israil Khan* v. *State of Assam* A.I.R. 1951 Assam 106.
(26) *Russell* v. *The Queen* (1882) 7 App.Cas. 829, 838, 839.
(27) *P.E. Long & Ors.* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* Penang Criminal Applications No. 5, 6 & 7 of 1976 (to be reported).

CRIMINAL APPLICATION.

Karpal Singh (*K. Kumaraendran* and *K. Balasundaram* with him) for the applicant.

Zaki bin Tun Azmi (Senior Federal Counsel) for the respondents.

Abdoolcader J.: Tan Boon Liat who enjoys the intriguing monosyllabic alias of Allen which might well perhaps be his *nom de guerre* in the operations ascribed to him seeks a writ of habeas corpus on an application returnable and argued before me 7 days ago on the complaint that his initial and continued detention in the Detention Camp, Pulau Jerejak, Penang, under an order made by the Minister of Home Affairs, Malaysia, in the exercise of the powers conferred on him by section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 ("the Ordinance") is illegal and unlawful as the grounds on which the order of detention was made are not within the scope and object of the Ordinance.

The applicant was arrested on December 4, 1975 in Kuala Lumpur and detained at the Jalan Bandar Police Station until January 26, 1976 when he was served with the detention order made by the Minister under section 4(1) of the Ordinance, the requisite statement under section 5(2)(b) of the grounds on which the order was made and the allegations of fact on which the order was based and the relevant forms for making representations against his detention, and then taken to the Detention Camp. A translation of the grounds and allegations of fact which are stated in the national language reads as follows:

"GROUNDS ON WHICH THE DETENTION ORDER IS MADE.

That you are an active local 'infra-structure' member of an international drug distribution syndicate. Your activities have not only damaged the international image of Malaysia but have also caused an increase in criminal activities involving violence connected with drugs and you have thereby acted in a manner prejudicial to public order.

ALLEGATIONS OF FACT.

1. That you have since the month of October 1975 been an active local 'infra-structure' member of an international drug distribution syndicate.

2. That you have since October 1975 up to the time of your arrest on December 4, 1975 actively assisted members of the syndicate in obtaining a supply of drugs from Kuala Lumpur, Penang and Kedah for smuggling overseas."

The applicant now challenges the validity of the order of detention solely on the contention, as I have stated, that the grounds on which the order was made are dehors the purview and ambit of the Ordinance. The Ordinance is clearly intituled, as I have indicated, the Emergency *(Public Order and Prevention of Crime)* Ordinance (emphasis mine), and as the preamble has been mooted in support of the contention put forward on behalf of the applicant, it might perhaps be convenient at this stage for ease of reference to set out the pertinent part of the preamble and the provisions of section 4(1) of the Ordinance:

"AND WHEREAS the di-Pertuan Agong is satisfied that immediate action is required for securing public order, the suppression of violence and the prevention of crimes involving violence:"

....

"4.(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years."

It would appear from the provisions hereinafter set out that the preventive detention provided for in the Ordinance is correlated directly to the apprehended violation by the person detained of the rights of others and indeed of the community at large by disturbing or acting in any manner prejudicial to public order or resorting to violence or crimes involving violence against the background of the existence of a grave emergency.

The Ordinance, it must be remembered, is emergency legislation enacted by the Yang Dipertuan Agung by virtue of the powers vested in him under Article 150(2) of the Federal Constitution as a result of a Proclamation of Emergency issued by His Majesty under clause (1) of that Article. The principle that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the executive has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved. This view was clearly stated in *Liversidge* v. *Anderson*[1] and I refer in particular to the speeches of Viscount Maugham (at page 219), Lord Macmillan (at page 251) and Lord Romer (at page 280) when he observed:

"It was, indeed, said on behalf of the appellant in *Greene's* case that where an Act of Parliament is capable of more than one construction, the courts will adopt that construction which is the least likely to lead to any invasion of the liberty of the subject. That in general is a very salutary rule, but we are dealing here with an Act passed and regulations made under it in times of a great national emergency, and in view of this circumstances and of the objects which that Act and those regulations so plainly had in view, the courts should, in my opinion, prefer that construction which is the least likely to imperil the safety of this country."

Lord Wright in delivering the judgment of their Lordships of the Privy Council in *Eliezer Zabrovsky* v. *General Officer Commanding Palestine*[2] observed to the same effect. And in *Shreekant Pandurang Ketkar* v. *Emperor*[3] the Full Bench of the High Court of Bombay held to the like effect and went on further to state that in construing emergency legislation introduced for the protection of public safety, it is a profound mistake for courts of Justice to refuse to give effect to the plain and natural meaning of the words used on some supposed reluctance of the enacting authority to interfere with individual liberties and vested rights, and that in point of fact it is of the essence of most emergency legislation that it does interfere, often very drastically, with individual rights and liberties, the justification being that the rights of individuals must yield to considerations of public safety.

Senior Federal Counsel appearing for the respondents seeks to argue that the applicant by raising the argument as to the scope of the Ordinance, as he does, for determination in this matter is, in effect, asking the court to review the subjective determination of the Minister and this he is precluded from doing, but later agreed that this is not in fact so when I indicated to him that although, as I put it, the front and back doors may be closed to the applicant in that he is shut out from challenging the subjective satisfaction of the Minister, he is not without liberty to attempt to get in through the French windows by asking for a determination of the relevancy of the grounds for his detention in relation to the scope and object of the Ordinance.

I held in my judgment in *Yeap Hock Seng* v. *The Minister for Home Affairs, Malaysia*[4] that although the courts are precluded from adjudicating on the sufficiency of the subjective satisfaction of the Minister they can examine the grounds disclosed by the Minister for the detention to see whether they are germane and relevant to the object which the Ordinance prescribes. In other words, it is open to the courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of the law as the preventive detention under which the order professes to be made. An order of detention based on irrelevant grounds is invalid and if any of the grounds furnished to the *detenu* are found to be irrelevant while considering the application of the relevant legislation under which the detention is ordered and in that sense are foreign thereto, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed *(Rameshwar Shaw* v. *District Magistrate, Burdwan & Anor.)*.[5]

Where the detention under the relevant preventive detention law is not *bona fide*, the detention is illegal. An order can be said to have been made *mala fide* where there is malice in law though there may be no malice in fact and this may be deemed to exist where an order is made contrary to the objects and purposes of the particular preventive detention law or when the detaining authority permits itself to be influenced by considerations which are outside the scope of the legislation in question. A case of want of *bona fides* may be made out by proof that the order of detention was in fact made for ulterior purposes, that is to say, for purposes outside the needs of prevention and irrelevant to the object which the legislation has in view.

The crunch of the argument advanced on behalf of the applicant is that the scope of the Ordinance is limited and that it applies and is intended to apply only for the purposes of suppressing activities involving violence and preventing crimes of violence. Mr. Karpal Singh for the applicant submits that the allegation that the applicant is an active member of an international drug distribution syndicate (which is covered by the generic term 'trafficking in drugs' as defined in section 2 of the Dangerous Drugs Ordinance, 1952, and this counsel accepts) which is the basis for the detention order made against him is neither within the scope of the Ordinance nor contemplated by it. In support of this contention, he has devoted a considerable part of his argument to a consideration of the preamble to the Ordinance and has asked me to consider the preamble and more particularly the pertinent part thereof for the purposes of determining the scope and ambit of the Ordinance and its operative parts and, in particular, section 4(1).

It will suffice if I deal with the general principles applicable to the question of having recourse to the preamble to any statutory enactment as an aid to the construction or determination of the scope thereof without discussing in any detail the prolific case-law that has been generated on this aspect. The general rule with regard to the effect of a preamble upon the enacting part of a statute is that if the meaning of the enactment is clear and unequivocal without the preamble, the preamble can have no effect whatsoever. In *Ward* v. *Holman*[6] a claim that the Public Order Act, 1936 was limited to disorder at political meetings and the like and did not apply to private disputes even if conducted on the public highway was rejected, the Divisional Court holding that section 5 of the Act was unambiguous and could not be construed by reference to the preamble to the Act.

Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so, they cannot be cut down by reference to it. It is accordingly clearly settled law that the preamble cannot restrict the enacting part of a statute though it may be referred to for the purpose of solving an ambiguity.

Where the enacting words are clear, the preamble cannot operate to restrict that meaning. The preamble cannot limit or change the meaning of the plain words of a statutory provision. In *Secretary of State for India* v. *Maharajah of Bobbili*,[7] their Lordships of the Privy Council interpreted the plain meaning of a Madras statute regardless of the restrictive provision of the preamble thereof, and Lord Shaw in delivering judgment remarked that as the section of the statute made operative provisions in excess of the apparent ambit of the preamble, it was the section that must govern and not the preamble.

The most important aspect in this regard is that the preamble cannot be invoked for the purpose of creating ambiguity in a statute. As Lord Davey observed in *Powell* v. *The Kempton Park Racecourse Company, Limited*[8] (at page 185):

> "There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature."

Where the terms of an enactment are clear, precise and unambiguous, it must be applied and enforced according to its plain meaning, and it is not the business of the court to speculate as to what might have been in the mind of the enacting authority as it may appear to the court from the preamble or otherwise (*Badri Prasad* v. *Ram Narain Singh*[9] *per* Collister, J.).

It would appear to me that the preamble to the Ordinance is not relevant for the purposes of construing or considering the scope of the provisions of section 4(1) thereof as there is no ambiguity whatsoever in the latter. Section 4(1) clearly specifies the circumstances in which the Minister can arrive at his subjective satisfaction for the purposes of making a detention order with a view to preventing any person from acting *in any manner* (emphasis mine) prejudicial to public order or where it is necessary for the suppression of violence or the prevention of crimes involving violence. The scope of the Ordinance is no doubt indicated and reflected in the recital I have adverted to, namely, the requirement of immediate action for securing public order, the suppression of violence and the prevention of crimes involving violence. These are general and wide words projecting the purpose and purport of the Ordinance and, in my view, the enacting provisions of section 4 elaborate and provide for that purpose and purport in much wider terms, as they empower the Minister to order the detention of a person with a view to preventing him from acting *in any manner prejudicial to public order* (emphasis mine) — an amplification of the phrase 'for securing public order' appearing in the preamble.

It would appear with respect that counsel for the applicant is in fact seeking to create an ambiguity in the Ordinance when none exists for the purposes of having recourse to the preamble in order to restrict its scope. He places considerable stress on the words 'that immediate action is required' in the preamble as the basis of his argument that the purpose of the Ordinance was to restore order and that it could only have contemplated acts or crimes of violence committed within a reasonable period immediately after the incidents of May 13, 1969, and was intended to operate only until public order was restored. He submits that by the time Parliament met on February 20, 1971, the Ordinance had in fact spent its purpose and force and that it is significant that it was not re-enacted in a permanent form as an Act by Parliament. He contends that the drug problem was not as acute in 1969 as it has become since and that the Ordinance never in fact contemplated within its ambit such acts as trafficking in drugs.

I regret I can see no merit or force in these contentions advanced on behalf of the applicant. That immediate action was necessary after May 13, 1969, is beyond the pale of doubt, but I would think that the requirement of immediate action referred to in the preamble must necessarily correlate to the provisions of Article 150(2) of the Constitution which empower His Majesty to promulgate Ordinances having the force of law until both Houses of Parliament are sitting if satisfied that immediate action is required. The immediacy of the action cannot, in my view, be correlated to the life-span or rather operational efficacy of any Ordinance so enacted.

The fact that the Ordinance has not been re-enacted as an Act of Parliament is equally irrelevant as the Ordinance must necessarily by the express provisions of the Constitution continue to have effect until such time as either Parliament resolves otherwise unless sooner revoked by His Majesty (Article 150(3)) or it lapses at the expiration of a period of six months from the date on which the Proclamation of Emergency ceases to be in force (Article 150(7)). The Proclamation of Emergency issued by His Majesty on May 15, 1969, is still in force in law and in fact and the Ordinance promulgated as a result thereof is equally extant and functional, not theoretically, as counsel for the applicant puts it, but operatively, and applicable in circumstances warranted by its express provisions. The court is certainly in no position to pronounce the Ordinance moribund or exanimate on mere speculative hypotheses. Its enacted provisions must determine its scope and applicability, and in this regard I will presently have to deal with the question whether the matter of trafficking in drugs comes within its purview.

The contention that no substantial alteration in the ordinary law was intended is equally without substance as the Ordinance is emergency legislation and must be considered and construed in the light of its expressly enacted provisions, and its application and scope cannot be restricted, in the absence of limiting words in the enactment itself, to aggravated forms of prejudicial activity which are only calculated to engender violence as contended on behalf of the applicant.

It is my view therefore that no resort can be had to the preamble for the purposes of determining the issue before me and that the scope and ambit of the Ordinance in relation to the powers vested in the Minister under the provisions of section 4(1) must be determined by the express provisions enacted therein. And it would appear to me that the whole issue must necessarily centre on the connotation of the phrase 'acting in any manner prejudicial to public order' and, in particular, the words 'public order'. I was somewhat to my surprise and indeed disappointment not addressed on this aspect by either side but, be that as it may, it would now be necessary to consider the effect of these particular provisions and more particularly the import of the words 'public order'.

Public order is what the French refer to as '*ordre publique*' and is a less decentralised and narrower concept than the ordinary maintenance of law and order, and maintenance of public order entitles the executive authority to take action to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances. I had occasion to refer to this distinction in my judgment in *Yeap Hock Seng* v. *The Minister for Home Affairs, Malaysia*[4] (at page 285).

'Public order' means the tranquillity and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law affords *(Board of Commissioners of Peace Officers Annuity and Benefit Fund* v. *Clay).*[10] The American view on 'public order' was well expressed in *Cartewall* v. *Connecticut*[11] (at page 308) thus:

> "The offence known as breach of the peace embraces a great variety of conduct, destroying or menacing public order and tranquillity. It includes not only violent acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot ... when clear and present danger of riot, disorder, interference with traffic upon public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious."

The expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification. The Supreme Court of India exhaustively discussed the import of the term 'public order' in *Romesh Thappar* v. *State of Madras*[12] (in particular at page 127) when it established the principle that the maintenance of public order is equated with the maintenance of public tranquillity, that 'public safety' is a part of the wider concept of 'public order', that 'public safety' ordinarily means security of the public or their freedom from danger and in that sense will include the securing of public health, that is to say, anything which tends to prevent dangers to the public health may also be regarded as securing public safety.

In *State of Rajasthan* v. *G. Chawla,*[13] the Supreme Court of India held that the substance of a statute regulating the growing nuisance of blaring loud-speakers powered by amplifiers of great output was conceivably within the legislative powers conferred by the Constitution of the State to legislate on matters pertaining to public order and certainly in relation to public health. The Supreme Court decided in *Pushkar Mukherjee* v. *State of West Bengal*[14] that the contravention of any law always affects order but before it can be said to affect public order it must affect the community or the public at large, and that in this connection a line of demarcation must be drawn between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals, and only in a secondary sense public interest. This principle was applied and followed by the Supreme Court in *Sushanta Goswami* v. *State of West Bengal*[15] (at pages 1006, 1010) and *Shyamlal Chakravarty* v. *Commissioner of Police, Calcutta*[16] (at page 272).

Maintenance of 'law and order' is a conception much wider than that of maintenance of 'public order'. The latter is the prevention of a disorder of a grave nature. Every act that affects 'law and order' need not affect 'public order'. 'Public order' is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of 'law and order' *(Sudhir Kumar Saha* v. *Commissioner of Police, Calcutta).*[17]

The Supreme Court of India held in *Kanu Biswas* v. *State of West Bengal*[18] (at page 1658-9) that the test to be adopted in determining whether an act affects law and order or public order is: Does it lead to disturbance of the current of life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? And again in *Kishori Mohan Bera* v. *State of West Bengal*[19] that the true test is not the kind, but the potentiality of the act in question. *Sk. Kedar* v. *State of West Bengal*[20] decided to the like effect that in relation to public order the determinant factor is one of degree and the extent of the reach of the act upon society and not merely the nature or quality of the act.

This test runs concordantly like a golden thread, if I may so put it, through the cases decided by the Supreme Court of India and was recently applied in *Milan Banik* v. *State of West Bengal,*[21] and again in *Golam Hussain* v. *Commissioner of Police, Calcutta*[22] when the Supreme Court observed (at page 1343):

"The nature of the act, the circumstances of its commission, the impact on people around and such like factors constitute the pathology of public disorder. We cannot isolate the act from its public setting or analyse its molecules as in a laboratory but take its total effect on the flow of orderly life. It may be a question of the degree and quality of the activity, of the sensitivity of the situation and the psychic response of the involved people. To dissect further is to defeat the purpose of social defence which is the paramount purpose of preventive detention."

In *Rex* v. *Basudeva*[23] the question arose as to whether habitual indulging in black-marketing affected the maintenance of public order in a case where the respondent who habitually indulged in black-marketing in kerosene oil was detained under the U.P. Prevention of Black-marketing (Temporary Powers) Act, 1947 made under legislative powers entrusted to the State in relation to the maintenance of public order, when the Federal Court of India observed (at pages 68-9):

"The learned Advocate-General urged that habitual black-marketing in essential commodities was bound sooner or later to cause a dislocation of the machinery of controlled distribution which, in turn, might lead to breaches of the peace and that, therefore, detention with a view to prevent such black-marketing was covered by the entry. It is true that black-marketing in essential commodities may at times lead to a disturbance of public order, but so may, for example, the rash driving of an automobile or the sale of adulterated food stuffs. Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of Entry 1 of List II. Preventive detention is a serious invasion of personal liberty, and the power to make laws with respect to it is, in the case of Provincial Legislatures, strictly limited by the condition that such detention must be for reasons connected with the maintenance of public order. The connection contemplated must, in our view, be real and proximate, not far-fetched or problematical."

But then black-marketeering is, of course, a far cry from such detrimental activities as trafficking in drugs and say, for example, rumour-mongering in relation to their impact on public order, and I would think that in any event such a case as this might well at least perhaps where essential and controlled commodities are involved be decided differently today in relation to its impact on the maintenance of public order. It has since however been held by the Supreme Court of India in *Rameshwarlal Patwari* v. *State of Bihar*[24] that preventive detention for black-marketing was valid under the powers of preventive detention in relation to the maintenance of supplies because it has the shortening of supplies as its base.

The case of *Israil Khan* v. *State of Assam*[25] pertained to the prevention of opium smuggling. The petitioner in that case, Israil Khan — a delightfully incongruous formation of a name remarkably suggestive of a semitic and saracen admixture and an ideal solution to the Middle East conflict — who incidentally also bears the singularly unique alias of Babua was ordered to be externed from the Province of Assam for a period of three years under the Assam Opium Prohibition Act, 1947 on the ground that he was a habitual smuggler of opium. He challenged the validity of the legislation in question on the ground that it infringed the provisions of the Constitution of India guaranteeing his fundamental right of freedom of movement. The High Court of Assam held that although the externment provided for by the Act impaired the right guaranteed to all citizens to move freely throughout the territory of India by Article 19(1)(d) of the Indian Constitution, it was not invalid as that right was not absolute and could be curtailed to the extent provided for in Article 19(5) which saves any existing or future law imposing reasonable restrictions on the exercise of such right in the interests of the general public. Public interest has many facets such as public order, public health, public security or safety or public morals, and the decision in that case confirming the validity of the statute in question must necessarily have been grounded on the basis of the maintenance of public order which would allow restrictions to be imposed on the movement of habitual offenders, or persons endangering harmony between different classes or sections of the community and generally for preventing any criminal act.

The Judicial Committee of the Privy Council held in *Russell* v. *The Queen*[26] (at pages 838-9) that laws placing restrictions on the sale or custody of poisonous drugs, dangerously explosive substances as well as intoxicating liquors relate to and are designed for the promotion of public order, safety or morals.

Applying the norms and principles enunciated in the selection of cases I have adumbrated (which are by no means exhaustive on the topic under consideration) and with which I wholly agree and would respectfully

adopt, it is abundantly clear that trafficking in drugs as a member of an international drug distribution syndicate which is the ground on which the order of detention against the applicant was made strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order. It is not necessary to elaborate on the deleterious effects of drugs. Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally.

The issue involved in this matter was in fact raised recently in *P.E. Long et al.* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Two Ors.*[27] before Arulanandom, J., when he decided that detention for trafficking in drugs is within the purview of the Ordinance. I have approached and considered the question in issue independently and have come to the same conclusion.

I am accordingly of the view that the ground on which the order of detention was made against the applicant, namely, trafficking in drugs, is within the scope and ambit of the Ordinance and that the contention to the contrary raised on behalf of the applicant is ill-founded, and I would in passing express the hope that my judgment in this matter will have served a purpose, if for nothing else, at least perhaps in providing a sufficient contraceptive against the proliferation of like applications for habeas corpus founded on the identical contention.

I must express my appreciation to counsel on both sides for the careful arguments addressed to me and it is no indication of disrespect to them that I have not in this judgment dealt with the cases they cited to me but I have thought it necessary however to consider and discuss other authorities not cited by either side but which appear to me to be pertinent to the crux of the contention raised in this matter. If I may seem to have quoted authority overmuch, this was to satisfy the desire to manifest the comforting sentiment that my decision on the issue involved is reinforced by the sanction of something stronger than my own unaided thought.

In the event *cadit quaestio*. Habeas corpus cannot as a result go and the application fails.

Application failed.

Solicitors: *Karpal Singh & Co.*

LOH KOH FAH v. LEE MOY LAN

[O.C.J. (Hashim Yeop A. Sani J.) April 30, 1975]
[Ipoh — Originating Summons No. 82 of 1974]

Guardianship of Infants — Custody — Application for custody of infants — Infants living with mother in Singapore — Meaning of "welfare of the infant" — Guardianship of Infants Act, 1961, ss. 5, 10 and 11.

The parties were married in December 1964, and after the celebration of their marriage lived with the applicant's parents in Ipoh. Subsequently, they moved into their matrimonial home in Ipoh. In mid 1970 the applicant and the respondent mutually agreed that the children should be moved to Singapore to receive their education there. The applicant visited his family in Singapore regularly until the end of 1973. He claimed that he stopped visiting them because he felt unwelcomed by the respondent. In the meantime, the applicant built up his business. On November 27, 1973, the applicant wrote to the respondent requesting her to return to Ipoh with the infants but she refused. The applicant contended that it would be in the best interest of his family that they should all live in Malaysia because of the changing economic situation, and as all his business commitments were in Malaysia. The respondent resisted the application on the grounds, namely, that the applicant was highly involved with his business interests and could spend very little time with his children as he was constantly on the move.

Held: (1) the expression "welfare of the infant" set out in section 11 of the Guardianship of Infants Act, 1961 should be construed in the widest possible terms. The court should put itself in the position of a reasonable and wise parent and determine what would be best for the infants, not what a selfish parent wants the infant to have;

(2) having regard to the circumstances of the case, custody of the children would be vested in the respondent but guardianship of the infants should continue to remain with the applicant. The latter should have unrestricted access at all times.

[Editorial Note: This case was affirmed by the Federal Court, by a majority, on June 14, 1976. The Federal Court decision will be reported in due course.]

Cases referred to:-

(1) *Sim Hong Boon* v. *Lois Joan Sim* [19)3] 1 M.L.J. 1.
(2) *The Queen* v. *Gnygall* [1893] 2 Q.B. 232, 248.
(3) *Re Satpal Singh, An Infant* [1958] M.L.J. 283.
(4) *Allen* v. *Allen* [1948] 2 All E.R. 413.
(5) *Re T (Infants)* [1968] Ch.D. 704, C.A.

ORIGINATING SUMMONS.

M. Sivalingam (*Miss P. Leow* with him) for the applicant.

Liew Choy-Hung (*Miss*) for the respondent.

Hashim Yeop A. Sani J.: This is an application by the father of 3 infants, Loh Hui Shien, Loh Kwok Yuan and Loh Kwok Shiang, aged 9 years, 8 years and 7 years respectively, for their custody during their minority or until such further order. The eldest child is a girl and the two younger ones are boys. These infants are presently residing with their natural mother, the respondent who at the time of the hearing was still the lawful wife of the applicant. The applicant is residing in Ipoh and the infants and the respondent are residing in Singapore.

The background facts to this case as can be elicited from the affidavits and the testimonies of the parties would seem to be briefly as follows. The parties were married in December 1964 and the infants are issues of the marriage born in 1965, 1967 and 1968 respectively. After the celebration of the mar-